



SEATTLE CITY COUNCIL

VIA ELECTRONIC MAIL ONLY

July 15, 2019

Mayor Jenny A. Durkan
600 Fourth Avenue, 7th Floor
Seattle, WA, 98104

Re: United States of America v. City of Seattle

Dear Mayor Durkan:

We write you today to provide you with our perspective on the City of Seattle's legal strategy related to the Federal Court's Order finding that the City is partially out of compliance with the Consent Decree as a direct result of certain provisions of the collective bargaining agreement with the Seattle Police Officers' Guild (SPOG).

I. Brief Background

With Councilmember González's leadership and in partnership with the Community Police Commission (CPC), the Seattle City Council unanimously approved a sweeping set of reforms to the City's accountability and disciplinary system in May of 2017. The 2017 Accountability Ordinance was legislated and negotiated under a prior Mayoral Administration and a former Chief of Police after several years of analysis of the existing accountability regime. The Community Police Commission led that analysis, which was, in large part, affirmed by police practices expert Bernard Melekian, who was retained by the prior Mayoral Administration to advise him on Consent Decree compliance and public safety matters.

After finding agreement on suggested policy reforms to the existing accountability system and with the Court's initial permission to engage in a legislative process, various stakeholders came together to develop legislation to enact those reforms. The City Council led that legislative process that spanned several months and involved site visits to three cities, hundreds of hours and dozens of stakeholder meetings and many committee meetings. This process was intentionally intensive and transparent so that we could thoroughly deliberate the myriad of policy decisions before the City Council. For those of us that actively participated in that legislative process, we can attest to the benefit that consultation with the CPC—as the court-mandated voice of the community—brought to bear on many of the policy choices that were made and ultimately reflected in the 2017 Accountability Ordinance. While we did not achieve 100% agreement with the CPC's recommended legislative proposals, the open legislative process ultimately led to an ordinance that had support from the community, the City Council and the Mayor.



SEATTLE CITY COUNCIL

After the former Mayor signed the legislation into law, City Attorney Pete Holmes submitted that legislation to Judge Robart for his consideration. Although Judge Robart did not approve the entirety of the legislation, he did indicate that the City should advance with implementing many aspects of the ordinance, including the creation of the Office of Inspector General for Public Safety, which the City has done. He, however, refrained from approving the entirety of the 2017 Accountability Ordinance until the City completed its negotiations with SPOG, largely because of a legitimate concern that the meaningful gains in the 2017 Accountability Ordinance would be compromised through the collective bargaining process. As a consequence, he required the City return to his Court after the ratification of a new labor agreement with SPOG concluded, so that he could evaluate whether the final contract fulfilled the purpose and intent of the Consent Decree.

We now know from Judge Robart's recent opinion that the City's ratified contract with SPOG—and specifically the provisions pertaining to the accountability regime—does not meet the Court's required standards and, thus, the City finds itself in the undesirable position of having fallen partially out of compliance with the Consent Decree. We are uncompromising in our commitment to the principles and importance of collective bargaining, and simultaneously join the Court in agreeing that the accountability system is a critical part of the overall effort to achieve long-term, sustainable police reform and community trust long after Court supervision concludes and should be reflected in the SPOG collective bargaining agreement.

II. The Court's Finding of Partial Non-Compliance With the Consent Decree

As it relates to Judge Robart's Court Order dated May 21, 2019, we wish to share our observations regarding the Court's findings that we believe are critical to our shared interest in advancing long-term, sustainable police reform and community trust.

- 1. Negotiated Selection Process, Standard of Review & Burden of Proof in Arbitrations.** We acknowledge that the Court did not specifically outline how the arbitration system and the standard of review and burden of proof as negotiated in the SPOG collective bargaining agreement could be modified to meet the Court's satisfaction. That leaves the City of Seattle's labor negotiators in a difficult position to know how much modification would satisfy Judge Robart's requirement for meaningful reform of the discipline system. Nonetheless, we believe that the Court's verbal and written order highlight specific aspects of arbitration that the Court finds problematic. In particular the Court found as follows:

Court's 5/21/19 Order

"Again, in its order to show cause, the court was particularly concerned by the reversal of former Chief of Police O'Toole's discharge of Officer Shepherd. The court noted the substantial differences between the process for review of that decision under the old arbitration regime and the new Accountability Ordinance prior to the Ordinance's alteration by SPOG's CBA. No party argues in favor of



SEATTLE CITY COUNCIL

the reversal of Chief O'Toole's decision or commends the outcome of that arbitration process to the court. Nevertheless, the City and the United States insist that the Officer Shepherd case is an aberration and the City should not be faulted for actions out of its control, especially because the City is appealing the decision. *But as the CPC points out, the issue is not just that an arbitrator reinstated this officer, but that the CBA (1) retains significant attributes of the old appeals system that the parties admit needs reform, and (2) abrogates critical reforms in the Accountability Ordinance that the parties put in place.*" (See Dkt. # 562, p.11, lines 1-16)(internal citations omitted) (emphasis added).

...

"Because the CBA eliminates reforms instituted by the Accountability Ordinance and leaves the old arbitration regime 'materially unchanged', the court finds that the city and SPD have fallen out of full and effective compliance with the Consent Decree concerning SPD discipline and accountability." (See Dkt. # 562, p.13, lines 12)(internal citations omitted).

Court's 5/15/19 Verbatim Report of Status Conference

"The Court, today, doesn't need to decide if – who is right and who is wrong. Instead, it asks the question, *if a labor arbitrator, whose livelihood is based on her continued selection, should have the ability to overturn the decision of a respected, trained, experienced chief of police. That's what the collective bargaining agreement addresses by going back to this particular system.*

The questions that the Court asks are, does this fully comply with the Constitution and the laws of the United States? Second, does this ensure public and officer safety? And, third, does this promote public confidence in the Seattle Police Department and its officers?

My decision today is not about Officer Shepherd. *It is about the changes to the accountability procedures that are found in the collective bargaining agreement, so as to weaken the system that was established in the accountability ordinance. But that's not the ultimate question, to me. The question is, does it so weaken the system to be a violation of the consent decree? The Court finds that they do.*" (See Transcript, p.17, line 12-p.18, line 4).

Together, these findings are significant and cannot be overshadowed by the Court's recognition that we have made significant progress in other important areas. These findings, furthermore, can be read to justify the City's position to, at a minimum, propose to SPOG that we mutually take advantage of the commonly used and legally available tool of a "re-opener" on the narrow issue of reforming the labor arbitration process. It is our understanding that the City cannot unilaterally "re-open" negotiations. Thus, if



SEATTLE CITY COUNCIL

SPOG declines to engage in a voluntary re-opener process on this issue, the City would have no choice than to wait for the next round of labor negotiations with those bargaining units. We believe that it cannot be overstated that there is strong mutual benefit to the City and to SPOG in addressing this narrow and resolvable issue through collective bargaining, if doing so puts us back in full compliance with the consent decree.

2. **Court Retains Jurisdiction Over City's Accountability System.** In ruling that the City is partially out of compliance with the Consent Decree, specifically as it relates to the accountability regime, the Court made it clear that the City's accountability system is both subject to and of critical import to future compliance with the Consent Decree. This finding was in reaction to the DOJ's and City's prior briefs arguing that the accountability system and disciplinary systems fall outside the Court's jurisdiction. The City's brief should avoid doubling-down on the theory that accountability and prior statements made about the accountability system do not fall within the Court's jurisdiction. Continuing to make these arguments damages the credibility of the City and potentially compromises the public's trust in the City's ongoing commitment to sustained police reform.
3. **The SPOG Contract Is Still In Effect.** We acknowledge that the Court made "no ruling concerning the CBA, specific provisions of the CBA, or how the City should conduct collective bargaining with any of its unions." (*See* Dkt. # 562, p.13, lines 4-6). Judge Robart did, however, identify the inherent conflicts between the reforms established in the 2017 Accountability Ordinance and the terms of the ratified contract; seemingly favoring some of the standards set in the 2017 Accountability Ordinance that were consequently modified in the CBA. (*Id.*, lines 9-12). While we agree that it is a challenge to determine precisely how to address the Court's issues with the ratified SPOG contract, Judge Robart did highlight a limited set of specific accountability-related issues that the Court seems to expect will be materially changed before finding the City in full and effective compliance. The City's brief should articulate a clear commitment and path towards achieving material change in future labor negotiations to the items identified as concerns to the Court.
4. **The Court Expressed A Preference For the Accountability Ordinance.** We agree that the Court did not rule that the City must pursue all provisions of the 2017 Accountability Ordinance and have them verbatim ratified in a CBA with SPOG. The Court did, however, indicate an affinity for aspects of the Accountability Ordinance, and the City should articulate to the Court that it intends to use the legislation as a guide and template for future labor negotiations, if SPOG declines a limited re-opener issues highlighted by the Judge in his oral and written findings.



SEATTLE CITY COUNCIL

III. City Council's Preferred Next Steps To Advance Meaningful Police Reform

In addition to the observations made above, we want to share our initial thoughts on how the City should approach the next four weeks to prepare for and finalize the filing due on August 15th:

1. **Joint Agreement to Limited Re-Openers.** We believe the City should in good faith exhaust all efforts to reach an agreement with SPOG to *jointly* reopen negotiations, out of deep respect for the collective bargaining process and a shared interest, on the issues of reforming labor arbitration process and addressing the 180-day timeline for investigations. We request that the Labor Relations Director, or other responsible party, provide the City Council a written plan on what steps will be taken to pursue this opportunity. We also request that the Labor Relations Director, or other responsible party, exhaust these efforts prior to the August 15th filing deadline. If SPOG declines to jointly reopen negotiations on the narrow issues as described above, we request that the City Attorney's Office include these facts in the City's brief due on August 15th.
2. **Immediately Pursue Already Agreed Upon Re-Opener.** The City and SPOG already agreed to a re-opener on the contract's terms that seek to limit the subpoena powers for the Office of Police Accountability and Office of Inspector General. This was the Court's third articulated concern regarding the CBA. We request that the Labor Relations Director develop a plan that describes the steps that will be taken to resume negotiations on the agreed-upon re-opener, issue a timeline for when that will occur and provide these items to the City Council by July 29, 2019.
3. **Setting the Framework for Future Negotiations.** Should the City fail to reach agreement with SPOG to jointly reopen the CBA on these specific items, it is our belief that the City should disclose to the Court that, despite the City's good faith efforts, our overtures were rejected by SPOG, as is their right under Washington State labor law. If this comes to pass, the City should inform the Court that, consequently, we must pursue modifying these aspects of the CBA in future negotiations of a new contract. In doing so, we believe the City should present the Court with a set of principles and values critical to the City (and consistent with Judge Robart's direction) which the City intends to follow in future labor negotiations to meaningfully modify the accountability-related aspects of the CBA and achieve full and effective compliance with the Consent Decree. This could be accomplished by, for example, establishing ground rules now or pursuing the bifurcation and sequencing of negotiated contracts such that matters related to officer discipline and accountability are negotiated first and contained in a contract separate from a contract that pertains to terms and conditions related to wages, benefits and operations.
4. **Beginning Future Labor Negotiations.** We believe that the City should begin labor negotiations with SPOG at the earliest opportunity as permitted by law to ensure the collective bargaining process includes the maximum allowed time to reach *joint*



SEATTLE CITY COUNCIL

agreement prior to the end of the current contract in 2020. We believe that the City can and should engage SPOG in labor negotiations on the full contract in early 2020. Article 21.1 of the current SPOG CBA states, in pertinent part: "Written notice of intent to amend or terminate this Agreement must be served by the requesting party upon the other party at least five (5) months prior to the submission of the City Budget in the calendar year 2020 (as stipulated in R.C.W. 41.56.440)." The last Monday of September 2020, in which the Mayor presents the proposed budget to the City Council, is September 28, 2020. Consistent with the SPOG CBA, that would mean the City's Labor Relations Director should provide notice to SPOG by no later than May 11, 2020. In our opinion, and out of respect for the negotiation process, if the City wishes to achieve agreement with SPOG prior to contract expiration and/or minimize the possibility of another 4-year negotiation process, we believe it is in all of our interests to begin bargaining in early 2020. We believe that this is consistent with the CBA provisions and with existing City law.

IV. Concerns Regarding The Retained Consultant Firm

Collectively, we learned via media reports that the Mayor's Office retained a suite of consultants from 21CP Solutions, which is a firm based in Chicago whose focus appears to be on policies and practices related to 21st century policing.

We are under the impression that the contracting of this firm will be presented to the Court as a response to his call for "the City and the United States, with the assistance of the Monitor and the Community Police Commission, to formulate a methodology (1) for assessing the present accountability regime, and (2) for how the City proposes to achieve compliance." (*See* Dkt. #562, p.13, line 22 – p. 14, line 1). Like the 24 community groups who recently wrote the City on this issue, we have serious questions and concerns about this approach and its intended outcomes.

Councilmember González, as the Council's Public Safety Chair, is charged with oversight of the City's ongoing compliance with the Consent Decree, yet she was not substantively briefed by the Mayor's Office or the City Attorney's Office about this proposed strategy; leaving the entire City Council in the unfortunate position of relying on media reports. Based on those reports and the review of the consultant contract with 21CP Solutions, we have serious questions and concerns about the scope of the consultants' work.

For example, will the consultants be tasked with doing a complete review of the accountability regime, as it existed before 2017? Will the consultants be tasked with doing a complete review of the accountability regime as reflected in the Accountability Ordinance passed by City Council under a prior mayoral administration in 2017? Will the consultants issue an opinion that ultimately puts the City's labor negotiators at a disadvantage in future labor negotiations by affirming that the accountability regime as modified by the existing contract exceeds "national standards"? We believe it is critical to community trust and sustainable police



SEATTLE CITY COUNCIL

reform for the City to speak in one voice on these issues and others that may arise as a result of the Executive's decision to hire these consultants.

We believe that so long as the Executive Branch doubles-down on the perspective that the CBA's current terms related to arbitration, investigation timelines and subpoena powers should be satisfactory to the Court, then we run the risk of remaining out of Full and Effective Compliance and under Court supervision for many years to come. Moreover, bringing in outside consultants to potentially rehash the analysis, evaluation and policy-making that was conducted collaboratively by community leaders, the City Council and the prior mayoral administration is damaging to the public's trust in the very system that we purposefully designed to permanently include the public's voice in this challenging arena. Proposed changes are best negotiated at the bargaining table among the joint parties to ensure compliance with the 2017 Accountability Ordinance and Court order, not through an external consultant process.

With regard to the August 15th filing, we request additional details on how the issues we have identified herein will be addressed and how, if at all, these issues will be communicated and represented to the Court. This includes additional information regarding how the City will involve the CPC and Monitor as directed by the Court, the ongoing and developing scope of the 21CP Solutions consultant contract, the expected cost a contract for "Phase II" of the consultants' work and the associated timelines for all work product in all proposed phases.

V. Establishing Meaningful Engagement of the City Council

Finally, although this City Council played an instrumental role in legislating and advancing the 2017 Accountability Ordinance, we are disappointed that neither your office nor the City Attorney's Office has meaningfully engaged members of the Council, especially Councilmember González, on key issues related to the 2017 Accountability Ordinance and the issues identified in the Court's Order finding that the City is now partially out of compliance with the Consent Decree as a result of accountability provisions that were either rejected or replaced in the SPOG contract. We do not believe this is a prudent or responsible approach.

It is also our firm belief that the Court would expect that the City Council, especially the Public Safety Chair, would be meaningfully engaged in the ongoing effort to maintain and/or restore the City to full and effective compliance with the Consent Decree. That level of cooperation and coordination was historically true with the prior Mayoral Administration, who convened regular meetings with the Mayor, the Public Safety Chair, the Council President and the City Attorney. Those collaborative conversations were important to ensuring that the City was truly speaking with "one voice" on matters related to the Consent Decree and the City's legal approach to the same. We would welcome this approach or another agreed upon approach that would facilitate the goal of aligning our shared interests on this critical policy issue.

Ultimately, we would like there to be a fluid back-and-forth communication between your office and our offices so that the City Council can provide meaningful input into the



SEATTLE CITY COUNCIL

development of the City's legal strategy and the development of the City's final positions that will be represented to the Court in the City's brief due on August 15th and beyond.

We look forward to meaningfully engaging with you and your staff as the City of Seattle charts a path forward that centers the City Council's historic work on the Accountability Ordinance, while also respecting our local community perspectives and our obligations to engage in good faith bargaining with our police unions.

We welcome the opportunity to have conversations with you and your staff on this matter over the next several weeks and beyond.

Sincerely,

Councilmember M. Lorena González
Position 9 // Citywide

Councilmember Teresa Mosqueda
Position 8 // Citywide

Councilmember Lisa Herbold
District 1 // West Seattle & South Park

cc: City Attorney Pete Holmes
Chief Carmen Best, Seattle Police Department
Merrick Bobb, Federal Police Monitor
Michelle Chen, Counsel to Mayor Durkan
Bessie Scott, Community Police Commission
Lisa Judge, Office of Inspector General for Public Safety
Andrew Myerberg, Office of Police Accountability